SUPREME COURT, U.S.
71-219
AUG 18 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. ..... MISC.

CHARLES VERNON HAWKINS,

Petitioner

versus

THE UNITED STATES OF AMERICA,

Respondent

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

JAMES F. MULLA, JR.
Counsel for Petitioner

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Petitioner respectfully moves this Court for leave to file the petition for writ of certiorari hereto annexed under Section 1251 and 1651 of Title 28 of the United States Code, directed to the United States Court of Appeals of the Fifth Circuit and the Honorable Judges of that Court.

JAMES F. MULLA, JR.
Counsel for Petitioner

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review an opinion of that Court entered June 21, 1971, which affirmed applicant's conviction in the United States District Court for the Eastern District of Louisiana, New Orleans Division, Honorable Edward J. Boyle, Judge and denial of petition for rehearing entered July 21, 1971.

A certified copy of the proceedings in the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals, Fifth Circuit will be transmitted simultaneously by the Clerk of the Fifth Circuit Court of Appeals with the filing of this Writ.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit affirming the conviction and denying rehearing on June 21, 1971 and July 21, 1971 respectively.

JURISDICTION TO THE REVIEW

The jurisdiction of this Court is invoked under Sections 1254(a) and 1651(a) of Title 28, United States Code.

This Court has jurisdiction thereby to review convictions under 15 U.S.C 902(e) and to entertain questions of Federal Due Process under the Fifth Amendment and to confrontation with the witnesses against him under the Sixth Amendment to the United States Constitution and further because there is a conflict among the Courts of Appeal of the United States on the question of law involved herein.

The claim of this appellant to have been convicted by the use of hearsay evidence, a violation of his right of confrontation, the illegal and unconstitutional use of 28 U.S.C. 1732 and 1733 and lack of guidelines for the application of these statutes, warrant this Court to exercise its right of review. These claims are set forth below under the heading "Reasons for Granting the Writ."

The question presented is:

Whether the admission of xerox copy of fingerprints for purposes of comparison and xerox copies of prison records under 28 U.S.C. 1732 and 1733 violated appellant's right to due process and confrontation?

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

CONSTITUTIONAL AMENDMENT V — CAPITAL CRIMES: DOUBLE JEOPARDY, SELF INCRIMINATION, DUE PROCESS, JUST COMPENSATION FOR PROPERTY

> No person shall be held to answer for a capital, or otherwise infamour crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the militia, when in armed service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTIONAL AMENDMENT VI — RIGHT OF THE ACCUSED

> IN all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTES

1.) 28 U.S.C. 1732

2.) 28 U.S.C. 1733

STATEMENT

Appellant was indicated, tried, convicted and sentenced under 15 U.S.C. 902(e), relative to interstate transportation of a firearm after previously being convicted of a felony.

Over the objection of appellant's counsel that the admission of Exhibits 5, 6 and 7 constituted hearsay and a denial of appellant's right to confrontation, they were admitted into evidence. (Transcript P. 122 ll 15, P. 125 lls 16 and lls 22-25, P. 126, P. 127 lls 1-16, P. 130 lls 4-13, P. 131 lls. 9-13, P. 132 lls 8-13).

Exhibits 5 and 6 are judgment of conviction in the lower court and affirmation of the appellant court of the same conviction. (Transcript P. 123 lls 21-25, P. 124 lls 1-8).

Exhibit 7 represents copies of records of the Bureau of Criminal Identification, Missouri State Penitentiary, which include Xerox copy of fingerprints. (Transcript P. 124 lls 8-18, P. 133 lls 13-21).

The above is the only evidence introduced to show appellant is one and the same as the person previously convicted. There was no direct testimony other than the fingerprinting expert, Mr. O'Neil.

Mr. O'Neil was asked to compare fingerprints of appellant taken at the time of his arrest for this offense with the Xerox copy of those prints appearing in Exhibit 7. (P. 139 lls 6-12, P. 142 lls 14-22, P. 140 lls 21-25, P. 142 lls 1-8). No evidence was ever introduced to show when, where or by whom the original fingerprints were taken, how or by whom they were placed in the prison record, nor even who made the Xerox copy of them.

REASON FOR GRANTING THE WRIT

There is a conflict in the Circuit Courts of Appeal of the United States and the lack of guidelines for the application of 28 U.S.C. 1732 and 1733.

The Fifth Circuit Court of Appeals has recognized the admissibility of documents covered by the statutes (28 U.S.C. 1732 and 1733) in a criminal case is limited under the Sixth Amendment guarantee of confrontation. *Mc Daniels v. U.S.* 343 F 2d 785, writ denied 382 U.S. 826, 15 L ed 2d, 71, 86 S. Ct. 59.

In *United States v. Burrus*, 418 F. 2d 677, 679, the United States Court of Appeals, Fourth Circuit clearly stated the law as it should be applied and specifically should have been applied to appellant's case as follows.

> In a criminal case, use of such records to prove commission of the crime deprives the defendant of the constitutionally guaranteed opportunity to confront his accuser. We conclude that the evidence was incompetent and should have been excluded.
>
> Viewed superficially, it is arguable that the above construction of the statute contraveness its plain language, which reads:

> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
> 28 U.S.C. sec. 1732

The better interpretation of this passage is that the one who makes the actual record entry need not have first hand information provided that the record was made in the ordinary course. In no event may a memorandum be evidence of an act which it was not made to record. Thus a police record would be admissible to show that a report was made to an officer, even though the recorder was not the officer to whom the report was made. On the other hand, the hearsay contained in the record remains inadmissible.

The weight of authority is in accord with this view. The leading case is *Johnson v. Lutz*, 253 N.Y. 124; 170 N.E. 517 (1930), which construed a similar provision of the Model Code of Evidence. Also see, *Gencarella v. Fyfe*, 171 F. 2d 419, (1st Cir. 1948); *Gordon v. Robinson*, 210 F. 2d 192 (3rd Cir. 1954); *Standard Oil Co. of Calif. v. Moore* 251 F. 2d 188, 214 (9th Cir. 1957), cert. denied, 356 U.S. 975, 78 S. Ct. 1139, 2 L. Ed. 2d 1148 (1958); *Yates v. Bair Transport, Inc.*, 249 F. Supp. 681 (S.D.N.Y. 1956); Mc Cormick, Evidence, sec. 286, p. 602 (1954). Professor Wegmore, in lonely dissent, recognizes that the decisions have gone the other way, 5 *Wegmore* sec 1530 a, n. 1, pp 391-392

Here appellant, thorugh his counsel, timely objected to the admission of the Xerox copy of fingerprints which were part of his prison record as well as the judgment of conviction, which objection was overruled.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

(Signed) JAMES F. MULLA, JR.
JAMES F. MULLA, JR.
633 Barracks Street
New Orleans, Louisiana 70116
525-7334

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing application has been served upon the United States Attorney and the Solictor General by placing a copy in the United States mail, properly addressed with adequate postage affixed thereto.

(Signed) JAMES F. MULLA, JR.
JAMES F. MULLA, JR.